STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2000
v	No. 211262 Washtenaw Circuit Court
STEVEN DWAIN SMITH, Defendant-Appellant.	LC No. 96-007187-FC

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his conviction and sentence for armed robbery, MCL 750.529; MSA 28.797. Defendant received an enhanced sentence as a third-offense habitual offender, MCL 769.11; MSA 28.1083, of twenty-five to sixty years' imprisonment. We affirm.

I

On appeal, defendant argues that the trial court's failure to follow MCR 2.511(F), by allowing multiple peremptory challenges before seating replacement jurors, deprived defendant of his constitutional rights and prejudiced the determination of his guilt or innocence at trial. We disagree.

At trial, defense counsel requested multiple peremptory challenges, and the court granted the request. Defendant excused several prospective jurors at once and replacement jurors were seated before further examination. Although this selection process violated MCR 2.511(F), because defendant requested to exercise more than one peremptory challenge at a time, reversal is unwarranted. Counsel cannot request a certain action of the trial court and then argue on appeal that the action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

II

Defendant argues that the trial court abused its discretion when it allowed the prosecution to admit irrelevant and prejudicial evidence of other bad acts that were similar to the acts alleged in this case. We disagree.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than introducing character evidence to show a defendant's criminal propensity. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). The prosecutor bears the burden of establishing relevance and a proper purpose. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

In this case, the prosecutor argued that the circumstances of the alleged robbery were sufficiently similar to other robberies to warrant introduction of the other acts evidence for identification purposes. The court ruled that the evidence was admissible.

On appeal, defendant argues that the trial court erred in admitting evidence of a similar robbery because the evidence was substantially more prejudicial than probative. However, the trial court could properly conclude that evidence of the other robbery was compellingly probative on the question of identity. *People v Goree*, 132 Mich App 693, 706, 708-709; 349 NW2d 220 (1984). The similarities between the two robberies suggested that they were the act of one individual. In both cases, the assailant wore a dark-colored hood pulled around his face; the weapon was described as a shiny metallic object; the victims were lone women in a school parking lot; both robberies occurred in the early morning; the perpetrator demanded that the victims get back into their cars; and eyewitnesses saw an older-model rusty white car in the area before the robberies. Thus, the probative value of the evidence was substantial. Further, the trial judge instructed the jury concerning the limited use of the similar acts evidence, thereby minimizing any potential prejudice. Under these circumstances, the trial court's ruling was not an abuse of discretion. *Crawford, supra* at 383; *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

III

Defendant argues that the trial court committed error mandating reversal when it failed to instruct the jury on the lesser included offenses of robbery unarmed, larceny from a person, and assault and battery. However, defendant failed to request that the jury be instructed with regard to these lesser offenses. Our Supreme Court has held that "with the sole exception of first-degree murder cases, failure of the trial court to instruct on lesser included offenses will not be regarded as reversible error, absent requests for such instructions before the jury retires to consider its verdict." *People v. Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975). Accordingly, reversal is unwarranted.

IV

Defendant argues that his sentence is excessive when compared to the circumstances of the offense and the offender. A challenge to the length of a habitual offender's sentence is reviewed for an abuse of discretion. *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996).

Defendant received an enhanced sentence as a third-offense habitual offender. Armed

robbery is punishable by imprisonment for life or for any term of years. MCL 750.529; MSA 28.797. Defendant's habitual offender status subjected him to an enhanced sentence of "imprisonment for life or for a lesser term." MCL 769.11(b); MSA 28.1083(b).

The trial court sentenced defendant to twenty-five to sixty years' imprisonment. The court noted the wave of crime that defendant chose to engage in within two years of defendant's release from prison for a prior armed robbery conviction. Our Supreme Court has held that when an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits does not constitute an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Because defendant's conduct while on parole and within the immediate two years after his release from prison demonstrates that defendant is unable to conform his conduct to the law, and a sentence of twenty-five to sixty years is within the statutory limits, we find that defendant's sentence was not an abuse of discretion.

V

Defendant argues that the trial court improperly denied defendant's request for a *Wade* hearing, *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), which prevented the jury from considering possible exculpatory identification evidence and, thus, deprived defendant of his due process rights. We disagree.

A *Wade* hearing is designed to determine whether an independent basis exists for a witness' in-court identification of a defendant. *Id.* If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, the witness' in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficient independent basis to purge the taint of the illegal identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977). However, in this case, defendant has not argued that any pretrial procedures were suggestive or impermissible. Under these circumstances, defendant was not entitled to a *Wade* hearing. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995).

VI

Defendant argues that his due process rights were violated when the jury was allowed to consider hearsay testimony of prosecution witness Detective Schubring, who repeated the victim's statement that she identified defendant as the person who robbed her upon seeing a photograph of defendant in the newspaper. Defendant failed to object to the admission of the now challenged testimony. Accordingly, defendant must show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 764-766; 597 NW2d 130 (1999). Although we agree that the challenged testimony was inadmissible hearsay, defendant has failed to show his substantial rights were affected where the testimony was cumulative of properly admitted testimony. *People v King*, 210 Mich App 425, 434; 534 NW2d 534 (1995).

VII

Defendant argues that the trial court improperly admitted irrelevant and unfairly prejudicial evidence of statements that defendant made during a previous trial while defendant was representing himself, and that the admission of this evidence deprived defendant of his due process rights. We disagree.

The victim testified that a shiny metallic weapon was held approximately two inches from her face between her eyes. She thought it was a knife at the time of the incident, but she could not focus on the weapon because it was too close to her face. The trial court did not abuse its discretion in finding that defendant's prior statements regarding the gun were relevant because the evidence had a tendency to make it more likely that the gun was the metallic weapon held in front of the victim's eyes. MRE 401; *Crawford, supra* at 388; *People v Collier*, 168 Mich App 687, 691; 425 NW2d 118 (1988). Moreover, on the record before us, the prejudicial effect of defendant's prior statements did not substantially outweigh their probative value. MRE 403; *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

VIII

Finally, defendant argues that the police officers illegally stopped his vehicle and arrested him, and because his arrest was without probable cause, the trial court should have suppressed the evidence seized. Thus, defendant was deprived of his right to due process. To the extent a trial court's decision regarding a motion to suppress is based on an interpretation of the law, appellate review is de novo. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). Factual findings made in conjunction with a motion to suppress are reviewed for clear error. *Id.*; *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

"The police may properly make an investigatory stop of a motor vehicle if the stop is based upon specific, articulable facts which, when taken together with the rational inferences to be drawn from these facts, would lead a reasonable police officer to believe that criminal activity may be taking place." *People v Spencer*, 154 Mich App 6, 10-11; 397 NW2d 525, citing *People v Sizemore*, 132 Mich App 782; 786, 348 NW2d 28 (1984). Defendant argues that the trial court erroneously concluded that the officers had sufficient grounds to stop defendant's vehicle. We disagree. Testimony established that the police officers knew that several robberies had occurred in Ann Arbor during the early morning hours. The robber was described as a black male approximately 5'7" to 5'8" tall, wearing dark clothing, a blue bandanna, and carrying a shiny metallic weapon. Witnesses had observed an older-model white vehicle with rust damage in the area around the time of each robbery.

In the early morning hours of October 15, 1996, the police saw a vehicle matching the suspect vehicle description; an officer observed the vehicle pull into a parking lot where he was on surveillance and then quickly back out. He observed that the passenger in the vehicle appeared to be a black male, possibly small in stature. Viewing the totality of the circumstances, we find that the investigatory stop of defendant's vehicle was based upon specific, articulable facts which, when taken together with the rational inferences to be drawn from these facts, would lead a reasonable police officer to believe that

criminal activity may be taking place. Accordingly, the officer's stop of defendant's vehicle was not illegal.

Once the police stopped defendant's vehicle, defendant's wife consented to a search of her purse. A search conducted pursuant to consent is an established exception to the general warrant and probable cause requirement of the United States and Michigan Constitutions. *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973); *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996). Accordingly, the discovery of the bandanna was not tainted by an illegal search. Thus, the evidence was properly admitted at trial.

Finally, discovery of the bandanna in defendant's wife's purse, coupled with the information known to the officers discussed above, established probable cause for defendant's arrest. It is well settled that a police officer may arrest an individual without a warrant if a felony has been committed, and the officer has probable cause to believe that the individual committed it. *Id*. at 115; MCL 764.15(c); MSA 28.874(c).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski